

**United States Department of Labor
Employees' Compensation Appeals Board**

J.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New York, NY, Employer**

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**Docket No. 16-0320
Issued: March 29, 2016**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 8, 2015 appellant filed a timely appeal from a September 11, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from December 4, 2014, the date of the most recent OWCP merit decision, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.²

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal appellant contends that the evidence she submitted was sufficient to warrant reconsideration of the merits of her case.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the September 11, 2015 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On July 22, 2014 appellant, a 40-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that she sustained injuries to her right arm on July 18, 2014 as a result of opening a door in the performance of duty. She stopped work on July 19, 2014.

Appellant submitted reports dated July 23 and August 20, 2014 from Dr. David Delman, a Board-certified internist, who diagnosed right shoulder sprain, right wrist sprain, and possible nerve injury to the right upper extremity and opined that appellant's conditions were causally related to a work-related accident on July 18, 2014. She further submitted two reports dated September 23, 2014 from Dr. Salil Gupta, a Board-certified orthopedic surgeon, who diagnosed subluxation of the right shoulder due to opening a heavy door at work on July 18, 2014 and opined that she was totally disabled for work due to her pain.

In an October 27, 2014 letter, OWCP advised appellant of the deficiencies of her claim and afforded her 30 days to submit additional evidence and respond to its inquiries.

Subsequently, appellant submitted physical therapy notes dated July 24 through September 23, 2014.

By decision dated December 4, 2014, OWCP denied appellant's claim as the medical evidence was insufficient to establish a causal relationship between her diagnosed conditions and the July 18, 2014 employment incident.

On June 2, 2015 appellant requested reconsideration and resubmitted the reports dated July 23 and August 20, 2014 from Dr. Delman and the two September 23, 2014 reports from Dr. Gupta. She also submitted a July 23, 2014 report from a physical therapist and resubmitted physical therapy notes dated July 24 through September 23, 2014.

By decision dated September 11, 2015, OWCP denied appellant's request for reconsideration of the merits finding that she did not submit pertinent new and relevant evidence and did not show that OWCP erroneously applied or interpreted a point of law not previously considered by OWCP.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right. It vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.³ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁴

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a

³ *Supra* note 1. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

⁴ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁵ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.⁶ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁷

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record⁸ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.⁹

ANALYSIS

The Board finds that OWCP properly refused to reopen appellant's case for further consideration of the merits pursuant to 5 U.S.C. § 8128(a). Appellant did not attempt to demonstrate that OWCP erroneously applied or interpreted a point of law. Moreover, she did not advance a legal argument not previously considered by OWCP.

In support of her June 2, 2015 reconsideration request, appellant submitted a July 23, 2014 report from a physical therapist. The Board finds that submission of this report does not require reopening appellant's case for merit review. OWCP denied appellant's claim based on the lack of supportive medical evidence. This new report does not constitute competent medical evidence, however, because a physical therapist is not considered a "physician" as defined under FECA.¹⁰ Therefore, it is insufficient to require OWCP to reopen the claim for consideration of the merits.

Appellant further resubmitted two September 23, 2014 reports from Dr. Gupta, and reports dated July 23 and August 20, 2014 from Dr. Delman. She also resubmitted physical therapy notes dated July 24 through September 23, 2014. The Board finds that the resubmission of this evidence did not require reopening appellant's case for merit review because she had previously submitted the same evidence, which was previously reviewed by OWCP in its December 4, 2014 merit decision. As the reports repeat evidence already in the case record, they

⁵ 20 C.F.R. § 10.606(b)(3). *See A.L.*, Docket No. 08-1730 (issued March 16, 2009).

⁶ 20 C.F.R. § 10.607(a).

⁷ *Id.* at § 10.608(b).

⁸ *See A.L.*, *supra* note 5. *See also Eugene F. Butler*, 36 ECAB 393, 398 (1984).

⁹ *Id.* *See also Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁰ 5 U.S.C. § 8101(2); *Jennifer L. Sharp*, 48 ECAB 209 (1996) (physical therapists). *See also Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

are duplicative and do not constitute new and relevant evidence.¹¹ Thus, appellant has failed to establish a basis for reopening her case for merit review.¹²

On appeal appellant contends that the evidence she submitted was sufficient to warrant a reconsideration of the merits of her case. However, the Board finds that appellant did not submit any relevant evidence to show that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by the OWCP. Because appellant only submitted repetitive evidence with her request for reconsideration, the Board finds that she did not meet any of the necessary requirements and is not entitled to further merit review.¹³

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the September 11, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 29, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹¹ See *supra* note 8.

¹² See *D.K.*, 59 ECAB 141 (2007).

¹³ See *L.H.*, 59 ECAB 253 (2007).